the estate as a whole like a general expense of administration. Therefore the deduction of the New Jersey tax as well as of the federal tax is perhaps justified, but the Wisconsin tax cannot properly be so treated for the reasons already indicated. The Connecticut court, however, lumped all foreign state inheritance taxes together without considering whether there was any difference in their character.

The apparent injustice of compelling a beneficiary to pay a duty to two states on something he does not get, namely, the full amount of his legacy or distributive share, no doubt inclines the court of the decedent's domicile to permit the deduction of foreign inheritance taxes. But this injustice is really the result of double taxation, of allowing more than one state to levy a duty on the transfer of the same property. It arises from the fact that the state of the decedent's domicile, on the fiction *mobilia sequuntur personam,* asserts that it grants the privilege of succession and so may tax it, while the other state, the state of the *situs,* asserts that it has the power of controlling how the property within its limits shall pass, that it grants the privilege of allowing such property to pass in accordance with the rules of the domicile, and therefore may tax this privilege.[12] It is not, however, the purpose of this discussion to enter upon a consideration of the validity of the theories which lead to double taxation. It is sufficient that the possible weakness of the court's opinion, in classifying all foreign state inheritance taxes as similar to the federal estate tax rather than analyzing them separately, has been pointed out, in the hope that, if incorrect, the rule laid down by the court with respect to deducting other state taxes may be corrected, or if correct, that the reasons for the decision may be more clearly set forth in later cases.

EFFICIENCY OR RESTRAINT OF TRADE

To develop a just, reasonable and practicable construction of the Sherman Anti-Trust Act and apply it to the complicated facts of our industrial and commercial structure is not a simple task. No rule of thumb, no test capable of easy and instant application to every situation, could either work justice or secure the economic ends for which the act was passed. The test of legality must first be expressed in broad general terms, like the act itself; it must then be applied with painstaking study and discrimination to the facts of each case, bearing always in mind the clear general purpose of the act; the border-line between lawful and unlawful must be pricked out, point

[12] See *Estate of Bullen* (1910) 143 Wis. 512, 520; 128 N. W. 109, 111. The evil of double taxation has been partially removed by recent legislation in Wisconsin. See Laws 1913, ch. 627, sec. 2. For similar legislation in Massachusetts, see Acts 1909, ch. 490, Part iv., sec. 3.

by point, as specific cases arise. The "rule of reason," much misunderstood and much criticised when it was first announced,[1] laid a sound foundation for future development. It focussed attention on the evils which the statute was intended to reach, which may be summed up as the artificial creation of non-competitive conditions in the sale of any product entering into interstate commerce, with the resulting enhancement of prices, deterioration of product, reduction of output, and other "characteristic evils of monopoly." An arrangement or course of conduct, whatever its form, whose purpose or necessary effect is predominantly or in any substantial degree to produce these evils is forbidden. One not so intended and not so resulting is outside the purview of the act.[2]

But however simply it may be stated, difficult questions of fact must arise in the application of such a rule. The law aims to secure, for the benefit of the consumer, vigorous and efficient competition. But the chief spur to competition is the desire to get the largest possible share of the business. Neither that object, nor even notable success in its achievement, can be held unlawful without defeating the very purpose of the statute. It is then a question of means. But the means employed for efficient competition may closely resemble those of monopoly. The union of two or three out of many competing concerns may be the best means to more effective competition. The added strength so obtained may make the difference between survival and failure in the war of competition. It seems clear that under the "rule of reason" such a combination is not unlawful. But the same combination as a step in a definite plan to eliminate competition and control the industry would be forbidden. And as intent may often be judged only by acts, it is easy to see that as combination is carried a little further and a little further, difficult questions of fact may arise in regard to the intent to be inferred. Nor is it wholly a question of intent. Combination may reach the point where, whatever its intent, the necessary practical result is to give the combined organization a substantial domination of the market, to free it from the checks and the spurs of effective competition. It can hardly be doubted that combination carried to that point is, regardless of its intent, within the reach of the law.

Again there can be no objection to the combination of two con-

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[1] In *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632.

[2] The "rule of reason" means merely that the test is not formal, technical or arbitrary, to be applied like a foot-rule, but calls for intelligence, reason and common sense in its application. Some early misconceptions of its meaning have been brushed away by later decisions. See for example, *Thomsen v. Cayser* (1917) 243 U. S. 66, 37 Sup. Ct. 353, discussed in (1917) 27 YALE LAW JOURNAL, 139.

cerns, making and selling two lines of goods, not competitive but supplementary. A maker of office desks and chairs and a maker of filing cabinets may properly unite, to secure the advantages of offering a complete line of office furniture. Here is only increased efficiency, and not restraint of trade. But here again, specific cases will not always be clear cut. The principal lines of the two combining concerns may have been desks and filing cases respectively; but both may have made chairs. Or one may have made flat-topped desks and the other roll-topped. Are these competing or supplementary lines?

Add further to the supposed combination the lawful monopoly of patent rights; large capital; remarkable business acumen and efficiency; and great commercial success; and the problem of determining how far the initial combination contributed to the business success attained, and whether its contribution was through legitimate increase in efficiency or through illegitimate suppression of existing or possible competition, is full of complications.

Such were some of the elements in the problem presented to the Supreme Court in *United States v. United Shoe Machinery Co.* (1918) 38 Sup. Ct. 473. The questions involved were so largely questions of fact that except as every actual decision gives concreteness to establish rules of law, the case adds little to the legal definition of the offenses denounced by the Sherman Act. The decision in favor of the company does, however, further emphasize some points which were tolerably clear before, as that neither mere size nor the fact of getting most of the business constitutes in itself an illegal monopoly. No doubt great size and wealth in themselves give power that may be abused, but if size and wealth are attained by legitimate means, the law must be content to watch for signs of abuse. On this point the conclusion of the majority of the court is summed up as follows: "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used has not been sustained."

The Government charged a general scheme of monopoly to which all the specific acts alleged were contributory and subordinate. These acts were of three general classes: first, the combination in 1899 of three or four companies manufacturing shoe machinery; second, the subsequent acquisition of a large number of smaller businesses, patent rights, etc., in the shoe machinery field; and third, the method of doing business by which machines were leased under leases alleged to contain oppressive clauses designed to extend and perpetuate the monopoly.[8]

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[8] The very complicated issues of fact involved in the sifting of these charges had been considered with painstaking fullness by the three judges who tried

With regard to the original combination, it appeared that the machines the constituent companies were making were in general non-competing, and that the chief result of the combination was to give the United Company a more nearly complete line of shoe machinery. That such a combination would involve no violation of the Sherman Act was obvious, and had already been decided by the Supreme Court in a criminal suit based on the same alleged monopoly.[4] The Government charged, however, that in respect to one type of machine, namely lasting machines, there was competition between two of the constitutent companies; and, in respect to welt-sewing machines, between one of these and a third constituent company. Had these claims been fully sustained by the evidence, the decision might have thrown some light on one of the many questions of degree involved in the application of the general rule of the Sherman Act to particular cases. It appeared, however, that the alleged competing machines were in general adapted to use on entirely different types of shoes, though there was some speculative possibility that by further improvement and adaptation they might have become more fully competing. In one instance such improvement was later made by the United Company. It is sufficient to say on this point that the findings of the District Court, virtually adopted by the Supreme Court, reduced the actual competition between the machines in question at the time of the combination very nearly to the vanishing point, and left only possibilities of future competitive development, much too speculative to furnish a basis for dissolving a combination which had stood unchallenged for twelve years before the bill was filed, and had long since practically superseded the original machines by the improvements it had itself developed.

Similar findings disposed of the long line of subsequent acquisitions, impressive in the mass, but losing most of their significance when examined in detail. The most important, that of the Plant shoe machinery patents, was complicated by mutual claims of patent

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the case in the District Court, each of whom wrote a long opinion, concurring in the decision in favor of the defendants. *United States v. United Shoe Machinery Co.* (1915, D. Mass.) 222 Fed. 349. The majority opinion in the Supreme Court discusses some few portions of the evidence in some detail, but rather by way of illustration than exhaustive consideration, and in the main adopts and relies on the findings and conclusions of the lower court. Two of the three dissenting judges also wrote opinions but they merely summarized certain portions of the evidence with the conclusions drawn therefrom. For any statement of the evidence in sufficient detail to judge of the merits of the conclusions, the opinions in the District Court must be carefully studied, and even these could give only an incomplete summary,—so great was the number and so complicated the details of the transactions covered by the inquiry.

[4] *United States v. Winslow* (1913) 227 U. S. 202, 33 Sup. Ct. 253.

infringement, by pending and threatened litigation, and by the fact that the Plant machinery, while ineffective and of little commercial value as it stood, contained patented features which could be developed as improvements to the United Company's machines, thus producing more efficient machinery than either Plant or the United Company could produce without the use of the other's patents.

If the difficulties which may arise on the facts in determining the legality of a *combination* are considerable, the difficulties of determining when conduct other than combination becomes an unlawful "attempt to monopolize" are still greater. Here it is perhaps even more true that the methods of legitimate competition may closely resemble the methods of attempted monopoly. Again it must be emphasized that monopoly in a legal sense is not simply getting all the business. Monopoly involves the idea of exclusion. "Monopolizing," in the absence of combination, means, within limits yet to be clearly defined by statutes or decisions, the exercise of oppressive, coercive or unfair means to exclude competitors from the market. The principal claim of the Government in regard to the United Company's leases will serve as an illustration. The claim was that by so-called "tying clauses" the lawful patent monopoly of certain "essential" machines was used to force shoe manufacturers to take also the United Company's auxiliary machines, with which otherwise manufacturers of other lines of shoe machinery might successfully have competed. If this claim had been sustained by the evidence it would seem from the reasoning of previous decisions that a violation of the law might perhaps have been found.[5]

But the facts were found not to support the charge. The whole leasing system was attacked by the Government as merely an instrument devised by the United Company to foster its monopoly. But the lower court found, and the Supreme Court affirmed the finding, that the leasing system was employed by the constituent companies before the combination; that it had a sound economic basis and had proved highly advantageous to shoe manufacturers and to the shoe manufacturing industry, particularly in enabling the small shoe manufacturer to compete successfully with his larger rival; and that on the whole the changes made by the United Company in the forms of the leases had been in the direction of greater liberality rather than less. The principal "tying clause" required the leased machine to be used only in connection with certain other machines leased from the

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[5] See especially *Motion Picture Patents Co. v. Universal Film Mfg. Co.* (1917) 243 U. S. 502, 37 Sup. Ct. 416, discussed in (1917) 26 YALE LAW JOURNAL, 600; and *cf. Standard Sanitary Mfg. Co. v. United States* (1912) 226 U. S. 20, 33 Sup. Ct. 9.

United Company. On violation of this condition the United Company could cancel the lease. The Government's expert testified that the Goodyear welter and stitcher were the only two "essential" machines, and the District Court's finding was practically to the same effect.[6] Had these machines been leased only on condition that they be used with other machines of the defendant, there would have been strong ground for the Government's charge. It appeared, however, that leases of these two machines had never contained that clause. The lessees of the welter and stitcher were entirely free to use them with any machinery of other manufacturers for performing other operations. It was the subordinate machines that were restricted to use with the Goodyear welter and stitcher. And even the subordinate machines were always obtainable on so-called unrestricted leases, without the "tying clause," on the same royalty, but with the addition of an initial payment.

What, then, was the reason for the "tying clause"? The royalties were fixed at so much a pair of shoes. The welter and stitcher had the largest royalties attached to them and had also recording devices to determine the number of shoes operated upon, which greatly simplified the difficult question of royalty accounting. The defendant could therefore afford to lease its subordinate machines on better terms to those who also used its welter and stitcher. There were other business reasons for the arrangement. It appeared that the efficiency of all the machines, and consequently their output and the royalties earned, depended on the very careful adaptation of each machine to use with the machines preceding and following it in the process of shoe manufacture. Again the United Company gave an inspection and repair service without additional charge, the cost of which per machine would evidently be less in a factory where many United machines were in use. These and other reasons were sufficient to justify the company in making better terms for a full set of machines than for individual machines. In fact most of the clauses to which the Government objected finally came down either to the question of a wholesale as against a retail rate, or to an inducement to the shoe manufacturer to make the greatest possible use of the machines leased, resulting in larger royalty earnings, and incidentally making possible a lower royalty rate.

But arrangements like that condemned in the *Motion Picture Co.* case[7] have something of the same element of a wholesale as against a retail transaction, with the very important addition, however, that in that case the vendor who sought to link two products together

[6] See 222 Fed. at p. 395.

[7] *Supra*, note 5.

refused to furnish them at all for separate use. But suppose that a company engaged in furnishing machinery for electric power plants refuses to take any contracts except for a complete installation. Is such a course of business in violation of the Sherman Act? Does it become so if the company has a lawful patent monopoly of one machine entering into the installation, so superior that its desirability, in connection with the policy described, furnishes a strong inducement to go to that company for the entire installation? There are difficult questions here, which future cases must answer. All we can gather from the *Shoe Machinery* case is that if alternative terms are offered for separate machines, and if there are legitimate business reasons for the wholesale rate, and if the course of business as a whole negatives the intent to make one or two superior machines a lever to force the sale of the rest, the arrangement may be upheld. While it gives us no final test for all cases, this seems a sound and sensible result as far as it goes.

One clause in certain of the United Company's leases seems to have been directly within the rule of the *Motion Picture Co.* case.[8] Leases of "metallic machines" (for attaching to shoes certain metallic fastenings) required the purchase of the fastening material from the defendant in lieu of royalty. This clause is not discussed in the opinion of the District Court, but is incidentally mentioned and might be taken as inferentially approved by the Supreme Court opinion. But too much weight can hardly be attached to this reference. The bill alleged a monopoly or attempted monopoly of shoe machinery, not of fastening material. If the clause in regard to metallic fastenings tended to unlawful monopoly of anything, it was of fastening material. It had therefore no tendency to support the charge in the bill, unless on the theory of cumulative evidence of general monopolistic intent. It was doubtless in this light that the majority opinion of the Supreme Court referred to it as a "mere make-weight" and "not of special materiality." It is to be noted also that when the case was tried in the lower court the *Dick* case,[9] since overruled by the *Motion Picture Co.* case, still stood as law on the validity of such conditions as that involved in the clause in question; and this is probably a further reason why objections to that clause were not pressed at the trial, or discussed by the District Court.

It may be possible, however, that we have not heard the last word on the legality of such a condition; that in a given case legitimate business reasons might be found to justify it, and take it out of the prohibition imposed by the *Motion Picture Co.* case. It is certain

[8] *Supra*, note 5.

[9] *Henry v. A. B. Dick Co.* (1912) 224 U. S. 1, 32 Sup. Ct. 364.

that we have not heard the last word on the shoe machinery leases. The case just decided turned wholly on the Sherman Act, the suit having been begun before the Clayton Act was passed. It is generally understood that certain provisions of the Clayton Act were aimed directly at the United Shoe Machinery Co. and its leases, though possibly rather at what was supposed to be their purpose and effect than at what the court in the Sherman Act case found these to be. A federal suit against the company under the Clayton Act is now pending in a different federal district from that in which the Sherman Act case was tried.[10] The ultimate determination of the legality of the leases under the present law must await the decision of that case.

The case just decided, as has been said, turned almost wholly on questions of fact.[11] Whether the conclusions of the District Court, affirmed by the majority of the Supreme Court, on these questions of fact, or those of the dissenting judges in the higher court, were more nearly correct, only one who had read all the evidence could reasonably undertake to judge. It may be said, however, as the Supreme Court held, that every reasonable presumption should be indulged in favor of the unanimous conclusion of the judges who sat through the long trial, heard most of the testimony in open court, and carefully read and sifted all the evidence. It should be said also that their opinions are thorough, well-reasoned, and much more convincing than the generalities of the dissenting opinions in the court above, which seem rather to jump to conclusions. Considering the popular impressions of the "Shoe Machinery Trust," the fondness which the Department of Justice has very naturally displayed for such shining marks, and the enormous labor involved in going carefully into the multitudinous issues which such a prosecution raises, it is rather reassuring to those who fear the tendencies of popular government that the Supreme Court, which has heretofore found so uniformly for the Government in all the big trust prosecutions, should have given this proof of its willingness to weigh each case on the

[10] See *United States v. United Shoe Machinery Co.* (1916, E. D. Mo.) 234 Fed. 127, in which the defendant's motion to dismiss was denied,—a decision, of course, purely on the sufficiency of the allegations of the bill, and preliminary to the taking of evidence to support the allegations. How far the findings in the Sherman Act case in regard to the intent and effect of the lease clauses under attack may be held to be *res adjudicata* in the Clayton Act suit is an interesting question.

[11] It is perhaps fortunate that the case turned largely on fact rather than law; for it was in effect a minority decision. Justices McReynolds and Brandeis, having been concerned as counsel at earlier stages of the case, took no part in the decision, and the remaining seven judges divided four to three. There might therefore have been some doubt of the ultimate authority of any new law laid down.

evidence and to discriminate where it finds judicial discrimination to be warranted. The demonstration would of course be more impressive had the result not been reached by so narrow a margin.

It must not be forgotten, in judging the correctness of the decision, that the ultimate result of the efficient competition which the law seeks to foster may appear superficially much like the result of the monopoly which it prohibits. A number of facts which appear to have been established, such as the continual efforts of the United Company to improve its product by constant experiment and large expense, its policy of giving its customers the benefit of these improvements without additional charge, the testimony of the witnesses to the excellence of its service, the lack of any substantial proof of unreasonable rates or charges, the repeated refusals to buy competing businesses or patents, much more numerous than the acquisitions actually made, the high level of efficiency constantly maintained, and the fact that so far as competition with patented machines is possible there has always been competition, tend strongly to support the conclusion of the majority of the court that here was a success established by distancing rather than by suppressing competitors, and maintained only by unremitting effort for greater efficiency in the face of actual or possible competition. In these days when we are realizing as never before the value of industrial efficiency, a decision that the law has no quarrel with success so obtained is particularly timely.

TORT AND CONTRACT IN THE MARKETING OF FOOD

It was a dictum in New York which introduced into American law the doctrine that in sales of foodstuffs a dealer always impliedly warrants their fitness for consumption.[1] The question has just come before the Court of Appeals for the first time, and the doctrine has been squarely affirmed, in *Race v. Krum* (1918, N. Y.) 118 N. E. 853.[2] The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of a filth product, tyrotoxicon, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. The instruction was on appeal held correct.

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[1] See *Van Bracklin v. Fonda* (1815, N. Y. Sup. Ct.) 12 Johns. 468.

[2] Discussed (1918) 16 MICH. L. REV. 555; the problem involved is also considered in (1908) 15 L. R. A. (N. S.) 884. The present comment deals wholly with liability to the *consumer* of food intended for human beings. See also (1914) 48 L. R. A. (N. S.) 213, 219; and on the more general relations of the topic, *ibid.* 213, and (1909) 19 *ibid.* 923.